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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER JAMES DAILY,

Defendant and Appellant.

B209077

(Los Angeles County
Super. Ct. No. BA338042)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed as modified.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant took a car that was parked outside a Fresno bank without permission. He was arrested six days later while driving the car in Los Angeles. A jury convicted defendant of unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)).¹ He was sentenced as a second strike offender to an aggregated state prison term of six years.²

On appeal, defendant contends the trial court's oral pronouncement of judgment includes two unauthorized probation conditions and requests we review the transcript of the in camera hearing conducted after his *Pitchess*³ motion was granted to determine whether the trial court properly disclosed all discoverable material. We strike the unauthorized probation conditions, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant sought pretrial discovery relating to the two arresting officers through a *Pitchess* motion. Upon finding defendant had demonstrated good cause to discover information in one of the officer's personnel records pertaining to dishonesty, the trial court granted defendant's motion, conducted an in camera review of the records and ordered disclosure of one document to the defense.

¹ In the same proceeding, defendant was also found guilty of grand theft automobile (Pen. Code, § 487, subd. (d)(1)). In a bifurcated proceeding, the trial court found defendant had suffered two prior serious or violent felony convictions under the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), and had served two separate prison terms for felonies (Pen. Code, § 667.5, subd. (b)).

² On the People's motion, the trial court struck defendant's conviction for grand theft automobile as well as one of his prior strike convictions for purposes of sentencing. Defendant was sentenced to four years (the two-year middle term doubled) for unlawfully driving or taking a vehicle, and two years for the prior prison term enhancements.

³ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

At defendant's sentencing hearing, the trial court ordered, as conditions of probation, that defendant pay a \$50 lab fee (Health & Saf. Code, § 11372.5, subd. (a)) plus penalty assessments (Pen. Code, § 1464, subd. (a)(1); Gov. Code, § 76000), and not "own, use, threaten to use, possess, buy or sell any deadly weapon or dangerous weapons, including, but not limited to, firearms or other concealable weapons." There was no defense objection to these probation conditions.

DISCUSSION

A. Pitchess Review

In response to defendant's request, we have reviewed the sealed record of the in camera hearing and conclude the trial court appropriately exercised its discretion in ruling on the material to be disclosed. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)⁴

B. Unauthorized Probation Conditions

The People agree with defendant that these two probation conditions are improper and may be challenged for the first time on appeal. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 354-355; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413.) The parties are correct.

⁴ Without objecting to this court's authority to conduct the requested review, the People argue the review is unnecessary under the particular circumstances of this case. According to the People, because the officer's credibility was "not a central issue at trial," even if the trial court abused its discretion by withholding from defendant some discoverable material, the error was harmless. However, the credibility of a trial witness is always at issue. In any event, the question of harmless error could not be addressed without the requested review.

The lab fee and its attendant penalty assessments are unauthorized and must be stricken. Defendant was convicted of violating Vehicle Code section 10851, subdivision (a), which is not one of the drug-related offenses listed in Health and Safety Code section 11372.5, subdivision (a), as requiring the imposition of a lab fee.⁵ The weapons condition must also be stricken. Possessing a deadly weapon is not per se criminal conduct (*In re Martinez* (1978) 86 Cal.App.3d 577, 581), and there appears to be no factual connection in this case between defendant's crime or future criminality and the weapons condition. (See *People v. Lent* (1975) 15 Cal.3d 481, 486.)

DISPOSITION

The judgment is amended by striking: (1) The \$50 lab fee (Health & Saf. Code, § 11372.5, subd. (a)), \$50 penalty (Pen. Code, § 1464, subd. (a)(1)), \$35 assessment (Gov. Code, § 76000); and (2) the probation condition ordering defendant not to “own, use, threaten to use, possess, buy or sell any deadly weapon or dangerous weapons, including, but not limited to, firearms or other concealable weapons.” As amended, the judgment is affirmed.

⁵ Health and Safety Code section 11372.5, subdivision (a), provides: “Every person who is convicted of a violation of Section 11350, 11351, 11351.5, 11352, 11355, 11358, 11359, 11361, 11363, 11364, 11368, 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, 11382, 11383, 11390, 11391, or 11550 or subdivision (a) or (c) of Section 11357, or subdivision (a) of Section 11360 of this code, or Section 4230 of the Business and Professions Code shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. . . .”

The trial court is to insure the abstract of judgment and minute order are corrected to comport with the modifications we have ordered. (See *People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2.)

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.